(14)

No. 04-340

Supreme Court, U.S.
FILED
JAN 24 2005
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF EVANDRO S. SANTINI AND SANTINI HOMES, INC. OF VERNON, CONNECTICUT, IN SUPPORT OF PETITIONERS SAN REMO HOTEL, L.P., *ET AL.*

EVERETT E. NEWTON
MURTHA CULLINA LLP
CityPlace I
185 Asylum Street
Hartford, Connecticut
06103-3469
(860) 240-6000

Counsel for Amici Curiae, Evandro S. Santini and Santini Homes, Inc.

January 24, 2005

Washington, D.C. • THIEL PRESS • (202) 328-3286

Page

TABLE OF CONTENTS

Interest Of Evandro S. Santini And Santini Homes, Inc. 1

Argument:

This Court Should Overrule The *Williamson County* State Court Requirement Or, In The Alternative, Clarify That Required State Court Litigation Does Not Extinguish, Preclude, Or Limit A Subsequent Federal Claim 9

Conclusion 14

TABLE OF AUTHORITIES

Federal Cases:

Agins v. Tiburon, 447 U.S. 255 (1980) 8

Armstrong v. U.S., 364 U.S. 40 (1960) 10

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 9

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) 7

Dolan v. City of Tigard, 512 U.S. 374 (1994) 5

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) 4, 6, 8

Hughes v. Washington, 389 U.S. 290 (1967) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) . . . . . *passim*

Mills v. Rogers, 457 U.S. 291 (1982) 3

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 12

Federal Cases, continued: **Page**

Penn Central Transport Co. v. New York City, 438 U.S. 104 (1978) . . . . . *passim*

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 3

Santini v. Connecticut Hazardous Waste Management Service, slip op. No. 3:01 cv 563 (WWE), Aug. 27, 2002, (D. Conn.), *affirmed on other grounds*, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004) 1, 2, 6, 8

Snider v. Excelsior Springs, 154 F.3d 809 (8th Cir. 1998) 13

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) . . . *passim*

State Cases:

Melillo v. New Haven, 732 A.2d 133 (1999) 3, 9

Santini v. Connecticut Hazardous Waste Management Service, 739 A.2d 680 (Conn. 1999), *cert. denied*, 530 U.S. 1225 (2000) 1, 4

State Constitutional Provision:

Connecticut Constitution, Article I, §11 3

BRIEF OF EVANDRO S. SANTINI AND SANTINI HOMES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS SAN REMO HOTEL, L.P., *ET AL.*

Evandro S. Santini and Santini Homes, Inc. of Vernon, Connecticut, have received the parties' consent to file this brief as *amici curiae* through blanket letters of consent filed with the Clerk of the Court.

INTEREST OF EVANDRO S. SANTINI AND SANTINI HOMES, INC.[1]

Evandro Santini has built homes and apartments for 37 years in the suburbs of Hartford, Connecticut. After immigrating to the U.S. in 1957 at age 17, he served several apprenticeships in the building trades. He founded Santini Homes, Inc. in 1970, and has been its president ever since.

From 1994 through 2004, Mr. Santini and his company (hereinafter "Santini") litigated through the Connecticut courts and then the federal courts a temporary taking case that vividly illustrates what commentators and courts have referred to as the *Williamson County* "conundrum" and its jurisdictional "Catch 22." *Santini v. Connecticut Hazardous Waste Management Service*, 251 Conn. 661, 739 A.2d 680 (1999), *cert. denied*, 530 U.S. 1225 (2000); slip op., No. 3:01 CV 563 (WWE), August 27, 2002 (D. Conn.), *affirmed on other grounds*,

---

[1] Pursuant to Rule 37.6 of this Court, the *amici* state that no counsel for any party authored any part of this brief, or paid for it. No one other than the *amici* or their counsel have made a monetary contribution to its preparation.

342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004). Simply summarized, because Santini adhered to the "state-court-first" requirement created by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), it took *ten years* to obtain a ruling on the merits of his Fifth Amendment taking claim. The tortuous path required of Santini illustrates why this requirement should be overruled or at least clarified and mitigated.

Santini's claim arose from a public agency's designation of his under-construction residential subdivision as a finalist for condemnation as a disposal site for low-level radioactive waste. As of June 9, 1991, Santini was building a fully-approved residential subdivision on 74 acres in Ellington, Connecticut. He had been working on the project for six years and had invested $5 million and borrowed $4 million to finance it.

The Connecticut Hazardous Waste Management Service ("Service") is a public instrumentality and political suvdivision of the State. Its principal duty is to oversee the handling and disposal of radioactive materials, including the identification, acquisition, and construction within Connecticut of a disposal facility for low-level radioactive waste.

On June 10, 1991, after two years of secret deliberations, the Service announced that the Santini development was one of three finalist sites for condemnation for public use as a disposal site for in-state generators (utilities, hospitals, universities, and industrial companies) of low-level radioactive waste. Shortly thereafter, the *Hartford Courant* newspaper displayed on its front page a map of the Santini subdivision next to the symbol for radioactivity.

Residents and public officials in Ellington and surrounding towns reacted to the announcement with protests and civil disobedience. In January 1992, Connecticut's governor proposed revocation of the agency's mandate to condemn an in-state site, in favor of seeking a municipality to volunteer. The legislature took four months to adopt the revocation, which was signed into law on May 5, 1992. By this time, however, economic use of the Santini development had been extinguished, and this continued until at least June 1993.

Since, under *Williamson County*, Santini could not bring a threshold taking claim in federal court, he sued (in March 1994) in state court under the takings clause of the Connecticut Constitution, Article I, §11 ("The property of no person shall be taken for public use, without just compensation therefor"). In a 1999 decision, the Connecticut Supreme Court confirmed the accuracy of Santini's 1994 choice of forum and theory of liability, holding under *Williamson County* that a Fifth Amendment taking claim *cannot be joined* with a state law taking claim that is brought in state court. *See Melillo v. New Haven*, 732 A.2d 133, 143 n.28 (1999).

Notwithstanding the exclusive state law basis of his taking claim, Santini expressly argued that the Connecticut courts, when interpreting the state's taking clause, must afford no less protection than is provided by the Takings Clause of the Fifth Amendment to the U.S. Constitution. Citing, for example, *Mills v. Rogers*, 457 U.S. 291 (1982), and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), Santini explained that decisions of this Court interpreting the Bill of Rights furnish the "floor" for protection of civil rights, and thus in interpreting the state's taking clause, the Connecticut courts needed

to adhere to Fifth Amendment tests and standards. In making this argument, Santini reviewed how Connecticut's two takings tests, which date to the 1960's and 1970's, were inconsistent with current federal standards and, in particular, with this Court's takings test as set forth in *Penn Central Transport Co. v. New York City*, 438 U.S. 104 (1978), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and their progeny.

In November 1999, the Connecticut Supreme Court, in a 5-2 *en banc* decision, affirmed a trial court denial of Santini's taking claim on the basis of two state law principles that were plainly inconsistent with this Court's takings jurisprudence, 739 A.2d 680 (1999). The court framed the dispositive issue as "whether mere government planning may constitute a taking, in the form of an inverse condemnation." It held that "mere governmental planning and temporary steps in anticipation of condemnation" do not, as a matter of Connecticut law, constitute a taking. It further held as a matter of state law that since the Service had never reached a "fixed and irreversible intent" to condemn the Santini property, no taking had occurred. The court cited *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 320 (1987), as stating an analogous, one-factor taking test and a conclusion that "depreciation in value of the property by reason of preliminary [government] activity" cannot constitute a taking.

Because it had resolved Santini's taking claim on these state law bases, the court noted, 739 A.2d at 688 n.19, that it was "not necessary to discuss the plaintiffs' factual claims" of the economic impact of the June 1991 siting designation on their property. *The court then*

rejected as irrelevant the takings jurisprudence of this Court:

> [T]he plaintiffs argue that we may not interpret the Connecticut Constitution so as to provide less protection for individual rights in the use of property than what they refer to as a "minimum, national standard for protection of individual rights in the use of property" as furnished by the "fifth amendment." In the plaintiffs' view, the constitutional doctrine that the federal constitution provides "minimum, national" standards means that, when the United States Constitution is interpreted to grant rights thereunder, our state constitution must be interpreted to grant at least the same level of protection as that granted by the federal constitution. *What is meant by that doctrine, however, is irrelevant to this case.*

739 A.2d at 688 n.20 (emphasis added). The court did not explain further. Finally, the majority dismissed the relevance of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas*, and *Penn Central* "because none of them involves mere planning by the government." 739 A.2d at 689.

Santini petitioned this Court for a writ of certiorari and was denied, 530 U.S. 1225 (2000).[2]

---

[2] The Questions Presented were:

1. Whether a state court, adjudicating an inverse condemnation claim that a property owner has brought in that court under a state law provision because a Fifth Amendment takings claim is not yet ripe under this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, must nonetheless adhere to the standards established by this Court's decisions interpreting the Takings Clause of the Fifth Amendment, and may not fashion it own, contrary takings standards.

[footnote continued]

Having satisfied the *Williamson County* state court requirement – after six years of litigation – Santini then brought a Fifth Amendment taking claim in federal district court in early 2001. On August 27, 2002 (in an unreported slip opinion, No. 3:01 cv 563 (WWE)), the court granted the Service's Motion to Dismiss for lack of jurisdiction. After reciting undisputed facts regarding Santini's development during 1984-91, his vested property rights, and his investment-backed expectations prior to June 1991, the court turned to the *Rooker-Feldman* doctrine, describing it as depriving a federal court of subject matter jurisdiction if "the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment." *Rooker-Feldman*'s prohibition, it said, reached not only claims expressly raised or decided in the state court, but also all claims "inextricably intertwined," with the scope of "intertwined" being determined by applying the elements of res judicata and collateral estoppel.

The court then shifted its focus to *Williamson County* and observed that "Federal law demarcates no clear approach to determine the preclusive effect of a previous

---

2. Whether the Connecticut Supreme Court, adjudicating a claim that a state agency economically idled for two years properly on which a subdivision was being built by designating that land as a low-level radioactive waste disposal facility, violated the Takings Clause of the Fifth Amendment by dismissing as "irrelevant" the standards established by this Court in *Penn Central Transportation Company v. New York City, First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* and *Lucas v. South Carolina Coastal Council,* and by holding that because the agency never demonstrated a "fixed and irreversible intent" to condemn, its action was "mere government planning" and could never be a temporary taking as a matter of law.

state court action instituted . . . in order to satisfy [its] ripeness requirement . . . ." It reviewed holdings of the Tenth and Eleventh Circuits that a Fifth Amendment claim *must* be raised in the state court proceedings. It then recited the contrary view of *Dodd v. Hood River County,* 59 F.3d 852 (9th Cir. 1995), that a federal taking claim *may* be brought after state court proceedings, but that the federal court must then determine whether the state court provided a determination "equivalent" to a federal adjudication, "so as to invoke . . . issue preclusion." The district court chose to follow *Dodd.* However, in conducting this search for an equivalent adjudication, the district court focused primarily on whether the Connecticut Supreme Court had engaged in a good faith effort to address the merits of the claim. It *did not* conduct a comparison of whether the Connecticut Supreme Court's 1999 adjudication of Santini's state law claim had employed or adhered to this Court's three-factor *Penn Central* analysis or its categorical *Lucas* formulation. The district court was also "unpersuaded . . . that collateral estoppel or *Rooker-Feldman* is inapplicable in light of the state court's failure to consider the tests set forth in *Lucas* and *Penn Central.*"

Santini appealed. In briefs and arguments in the U.S. Court of Appeals for the Second Circuit, Santini argued principally that because had had no opportunity to litigate a Fifth Amendment claim in the state court, and because the Connecticut courts assuredly did not provide him with the equivalent of an adjudication under *Penn Central* and *Lucas,* the federal district court erred in dismissing the case on jurisdictional grounds.

In August 2003, the Second Circuit reversed the district court on the jurisdictional issues, accepting Santini's argument that he had proceeded in state court involun-

tarily and had been prohibited in that forum from litigating his Fifth Amendment claim. 342 F.3d 118 (2003).[3] However, the Second Circuit reached the merits, holding that the Service's 1991 actions were "precondemnation" activity that had not caused a taking. Santini petitioned this Court for a writ of certiorari,[4] which was denied in 2004.

---

[3]By the time the Santini case reached the Second Circuit, the events giving rise to the taking claim had occurred ten to twelve years earlier. Among other things, the defendant's appraiser had died, and had the Second Circuit remanded to the trial court for an evidentiary hearing on the merits, that hearing would have examined events occurring more than a decade earlier.

[4]The Questions Presented were:

1. Did the Second Circuit err in interpreting *Agins v. Tiburon*, 447 U.S. 255 (1980), and *First Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), as holding that "precondemnation activity" is categorically exempt from liability under the Takings Clause of the Fifth Amendment?

2. Did the Second Circuit contravene several decisions of this Court by holding that an agency's proposed condemnation of an under-construction subdivision for public use as a radioactive waste disposal facility, which action continued for eleven months and undisputedly reduced the property's value from approximately $2 million to zero for at least 24 months and undermined a $5 million equity investment, was not a taking on the grounds that it was incomplete "regulatory" action of "short duration," and protecting the condemnation process from liability was "sound public policy?"

ARGUMENT

THIS COURT SHOULD OVERRULE THE *WILLIAMSON COUNTY* STATE COURT REQUIREMENT OR, IN THE ALTERNATIVE, CLARIFY THAT REQUIRED STATE COURT LITIGATION DOES NOT EXTINGUISH, PRECLUDE, OR LIMIT A SUBSEQUENT FEDERAL CLAIM.

The *Santini* case provides a compelling example of how the *Williamson County* state court requirement consigns a property owner who seeks adjudication of a federal taking claim to a long and tortuous path of litigation that few property owners can sustain, and which effectively denies the protection of the Takings Clause of the Fifth Amendment.

In bringing his taking claim, Santini followed *Williamson County*. He brought his claim in state court under the Takings Clause of the Connecticut Constitution. When he brought his case in state court in 1994, Santini's pleading options were unclear. On the one hand, *Williamson County*, on its face, appeared to say that a federal taking claim did not then exist, which would mean logically that it could not have pleaded, reserved, or stayed. On the other hand, the Connecticut Supreme Court's takings jurisprudence had not been updated to reflect *Penn Central* or *Lucas*, and thus to proceed under the state constitution appeared to require arguing that the state court must overrule several of its earlier decisions. Santini chose to plead the state constitution and argue that the takings cases of this court provided the floor for interpreting the state's takings clause. Santini's pleading choice in this regard was subsequently validated by this Court in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999) (a Fifth Amendment taking claim "did not accrue" until state court proceedings terminated), and in the Connecticut Supreme Court's

previously-mentioned *Melillo* decision (plaintiffs were "not entitled to consideration of [a Fifth Amendment taking claim] because of the existence of a legally sufficient procedure, under [the Takings Clause of the Connecticut Constitution"]), 732 A.2d at 143 n.28.

The Connecticut Supreme Court opinion, however, affirmatively violated this Court's Fifth Amendment Takings Clause jurisprudence in several ways. It rejected the principle that decisions of this Court interpreting the Fifth Amendment furnish minimum national standards for the analysis and adjudication of takings claims brought in state court under available state remedies. It dismissed as irrelevant, without explanation, the three-factor *Penn Central* test, *First English*'s recognition of temporary takings, and the *Lucas* categorical formulation of a taking resulting from a total loss of economic use. Because of its application of state law principles, the Connecticut court found it *unnecessary* to analyze the economic impact of the Service's action on the Santini property; this inquiry, of course, constitutes the first factor of the *Penn Central* analysis and the starting point of the *Lucas* test. The state court declined to employ the principle of *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), that the purpose of federal Takings Clause is to avoid having an individual bear an economic burden that should, in fairness, be borne by the general public. In addition, the Connecticut opinion employed a governmental "intent to condemn standard," in direct contradiction to such cases as *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (government's intent not relevant to takings analysis). Further, it stated in *dictum*, that *all* takings claims require evidence of complete economic loss, thereby contravening several decisions of this Court that recognize taking claims based on partial economic loss. Finally, by employing an intent standard, the Connecticut court effectively eliminated inverse condemnation claims in Connecticut because an inverse taking, by definition, arises from a total or severe impact on economic use that has occurred *without* intent to formally condemn.

Thus, it is beyond argument that Santini could not have brought his Fifth Amendment claim in federal court, but when Santini litigated his taking claim in state court under state law, he most assuredly did not receive, expressly or implicitly, an adjudication that was consistent with this Court's Fifth Amendment standards.

Worse, the federal district court dismissed Santini's Fifth Amendment Takings Clause claim for lack of jurisdiction. Although the Second Circuit reversed the jurisdictional dismissal and addressed the merits, it took Santini ten years and hundreds of thousands of dollars to achieve that result. It should also be noted that in the Second Circuit, Santini was forced to devote most of his appeal brief to the jurisdictional issues, and thus when the Second Circuit *sua sponte* reached and decided the merits, it did so based on briefs that barely touched upon the merits (and as a likely result, it misstated some critical testimony and misapprehended a portion of Santini's theory of liability for a taking).

In light of his experience as a litigant, Santini respectfully offers the following observations and prescriptions for resolving the issue before this Court:

1. The root of the problem arising from *Williamson County*'s state court requirement is whether a litigant proceeding in state court as required by this Court's 1985 decision is required to raise, permitted to raise, or prohibited from raising a Fifth Amendment taking claim. In interpreting *Williamson County*, the federal courts have

been inconsistent. Compare, for example, this Court's statement in *Del Monte Dunes* that a federal taking claim "does not accrue" until state proceedings have been completed, with its opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 615 (2001), in which the Rhode Island courts addressed a taking claim brought under the federal constitution, but this Court on appeal had no comment on that pleading choice.

2. The *Williamson County* state court requirement is based on the erroneous premise that a Fifth Amendment claim for a taking without just compensation does not come into existence until a state court has denied a taking claim brought under state law. If the operative facts give rise to a justiciable taking claim under state law, they must create at the same time a Fifth Amendment taking claim. The pleading basis and the forum may be different, but the "claim" necessarily exists in both forums.

3. The *Williamson County* state court requirement should be overruled because (a) it is based on an erroneous assumption regarding when a federal taking claim accrues, as explained above; (b) it has caused confusion and inconsistency for litigants and judges; (c) it requires property owners to engage in lengthy, expensive, sequential litigation in order to vindicate a federal civil right; and (d) at least in those states where the state courts refuse to adhere to this Court's takings jurisprudence as a minimum standard of civil rights protection, it *prohibits* property owners *ever* from obtaining an adjudication of their Fifth Amendment rights, as the *Santini* case illustrates.

4. The Ninth Circuit's "functional equivalent" approach is not a viable procedure, because it not only

preserves the requirement of sequential litigation, but potentially lengthens that litigation by requiring the first issue in any subsequent federal case to be whether the state courts have provided an adjudication that is equivalent to federal standards.

5. In the alternative, if the *Williamson County* state court requirement is not overruled, the *amici curiae* respectfully suggest that this Court clarify that:

- this Court's takings jurisprudence furnishes minimum, national standards for the adjudication of a taking claim under state law;
- an *England* reservation or similar procedure is unnecessary (because the federal claim does not yet exist); and
- the *Rooker-Feldman* doctrine, claim preclusion, and issue preclusion are inapplicable.[5]

In other words, if the state court requirement is to be preserved, then it should be clear that minimum federal standards apply, and the right to bring a subsequent federal claim is not procedurally extinguished, limited, or burdened by satisfying that requirement.

---

[5]One exception that might be recognized is, that where a state court has resolved a takings case on a state law ground (such as lack of a protected property interest) that effectively precludes adjudication of a Fifth Amendment claim, a federal court may decline jurisdiction under *Rooker-Feldman* because reopening the state court judgment would be a necessary predicate to relief in federal court. *See, e.g., Snider v. Excelsior Springs*, 154 F.3d 809, (8th Cir. 1998) (state proceedings unrelated to taking claims had extinguished property interest).

CONCLUSION

Taking cases are difficult to litigate and difficult to win. With the daunting substantive hurdles, restrictions, and standards that takings plaintiffs must overcome, it is apparent that overruling the *Williamson County* state court requirement, or clarifying it as suggested above, will not "open the floodgates" to the federal courts. Rather, those with a viable taking claim will decide whether and how to pursue it based on an assessment of its merits, rather than the specter of an endless procedural gauntlet.

Respectfully submitted,

EVERETT E. NEWTON
MURTHA CULLINA LLP
CityPlace I
185 Asylum Street
Hartford, Connecticut
06103-3469
(860) 240-6000
Counsel for Amici Curiae, Evandro S. Santini and Santini Homes, Inc.

January 24, 2005